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In The
Supreme Court of the United States

OCTOBER TERM, 1986

REGINALD J. HOLZER
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

First. Whether the conviction of a state court judge for mail fraud under 18 U.S.C. § 1341 can be sustained based upon a theory of intangible rights owed to the public where there is no economic harm shown.

Second. Whether the mail fraud statute should apply to a state court judge whose alleged breach of fiduciary duty under an intangible rights doctrine was the failure to disclose transactions to litigants, which the Illinois Supreme Court deliberately determined was not a ground for recusal or disclosure.

Third. Whether a criminal conviction under mail fraud can stand on the theory of state court bribery when the jury was not instructed on the elements of bribery as it related to mail fraud.

Fourth. Whether a mail fraud conviction should stand when it was in part obtained by prosecutors unfairly proving that alleged co-conspirators had unresolved charges of misconduct pending against them.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The Court of Appeals' opinion is reported at 816 F.2d 304. (App. 1). [1]

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1987. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

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[1] References to the trial transcript are cited as "Tr.____"; references to petitioner's appendix on appeal to the Seventh Circuit Court of Appeals are "Ct. App. A-____."

STATUTES INVOLVED

Title 18, United States Code, sections 1341, 1951-1955 (Hobbs Act), 1961-1968 (Racketeer Influenced and Corrupt Organizations Act), and 3161.

STATEMENT OF THE CASE

Reginald J. Holzer was a Circuit Court judge in Cook County, Illinois for many years. He was indicted on May 1, 1985. The jury convicted him on twenty-three counts of mail fraud, three counts of extortion, and one count for a violation of the Racketeer Influenced and Corrupt Organizations Act. The Court of Appeals affirmed his conviction on April 3, 1987, summarizing the essential facts as follows:

> Between 1968 and 1978 Holzer was assigned to the law division, which handles mainly personal-injury suits. Between 1978 and his indictment in 1985, he was assigned to the chancery division, which hears equity suits. While in the law division and then the chancery division Holzer repeatedly asked lawyers who were representing parties in matters over which he was presiding, and (in the chancery division) equity receivers appointed by him, for help in getting bank loans to shore up his precarious finances.

(App. 2).

The defendant admits the following facts:

First. He did request attorneys or receivers to recommend him to banks and third parties.

Second. From time to time, some of those lawyers or receivers had matters before the defendant.

Third. The defendant did not advise parties and litigants of his conversations with the lawyers and receivers who helped him.

The mail fraud indictments essentially charged a scheme to defraud based on defendant's abuse of his office and the breach of his fiduciary duty to the community, lawyers, and litigants. These "intangible rights" of the community included, according to the indictment, a duty to disclose the financial transactions to litigants and lawyers, among others, and a responsibility to recuse himself from cases.

The defendant was not charged with "fixing" cases. Indeed, the prosecution in final argument told the jury, "you are not going to see proof of any kind of a fix with regards to the attorneys who simply had cases before Judge Holzer." (Tr. 3920). The defendant's "misconduct" did not include improper "rulings" in exchange for any favors. The Court of Appeals held that such matters were in any event irrelevant.

> It is irrelevant that, so far as appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan so that his conduct caused no demonstrable loss either to a litigant or to the public at large.

(App. 8).

In short, the principal issue in the case was whether the defendant committed "fraud" by not disclosing to litigants or lawyers who appeared before him the assistance that he received from other lawyers. The failure of the defendant to recuse himself or disclose the loan assistance to litigants allegedly deprived the community of "faithful services," and the denial of these intangible rights was alleged to be "fraud" within the meaning of 28 U.S.C. § 1341.

The conduct of Illinois state court judges is governed by rules of the Illinois Supreme Court. Some years ago, formal rules were published after a blue ribbon advisory panel,

chaired by Dean Cribbet of the University of Illinois, reviewed the subject of judicial conduct and made recommendations to the Illinois Supreme Court. These rules covered those circumstances in which a judge should disqualify himself for specified "financial" conflicts. Other rules also were adopted requiring disclosure of certain transactions to litigants or parties. Loans, or the receipt of assistance in obtaining loans, were consciously excluded from the rules requiring recusal or disclosure to litigants. (Tr. 2319-2322, 3443-3447).

REASONS FOR GRANTING CERTIORARI

The Court should issue a writ of certiorari in this case because:

First. The Court presently has under consideration whether 18 U.S.C. § 1341, which makes mail fraud a federal crime, can properly be applied to an alleged breach of fiduciary duty owed to the public that causes no economic harm. *McNally* v. *United States,* Nos. 86-234, 86-286 (October 1986 term) (U.S. S. Ct.). The *Holzer* conviction is based on an indictment which charged the defendant as a public official for alleged breaches of fiduciary duties in circumstances where there was no economic harm. To the extent the Court holds that such circumstances do not constitute fraud within the meaning of 18 U.S.C. § 1341, that holding should apply to this case.

Second. The intangible rights doctrine in the *Holzer* case has been pushed to an unacceptable extreme. The Seventh Circuit held that a state court sitting judge had duties to disclose transactions to litigants even though the Illinois Supreme Court rules of judicial conduct, which controlled the judge's activities, included no such requirement. The Rule that incorporated the fiduciary duty to disclose to litigants various financial transactions, as directed by the Illinois Supreme Court, deliberately excluded the type of

transaction (loans) that was the basis of the indictment. The Court should set acceptable ground rules to determine what kind of fiduciary duties and so-called intangible rights come within the mail fraud statute. Petitioner believes that this grievous error should be redressed.

Third. The Court should not permit a conviction based on the Seventh Circuit Court of Appeals' conclusion that "bribery" occurred when the jury was not instructed on the elements of bribery as it related to the twenty-three mail fraud convictions.

Fourth. The Court should not permit prosecutors to obtain convictions unfairly by establishing at trial over objection that co-conspirator witnesses had been accused or charged with misconduct when such charges were pending and not resolved by the Illinois Attorneys' Disciplinary Commission.

I.

THE MAIL FRAUD CONVICTIONS WERE BASED ON THE "INTANGIBLE RIGHTS" THEORY; NOT ECONOMIC LOSS

The conviction of former Judge Reginald J. Holzer should be reversed. It was improperly grounded on the unacceptable premise that a sitting judge who complies with the published disclosure rules of his state supreme court can nonetheless knowingly commit fraud because the "intangible rights" of citizens and lawyers supposedly include duties not covered by rules of the state supreme court.

This Court has pending for decision the application of the mail fraud statute to public officials in Kentucky who allegedly defrauded the state's citizens of their "intangible rights" to honest government. *McNally v. United States,* Nos. 86-234, 86-286 (October 1986 term) (U.S. S. Ct.). The Seventh Circuit in the *Holzer* case noted the argument

currently being considered by the Court but concluded that the "intangible rights concept that the argument attacks is too well established in the courts of appeals for us to disturb." (App. 11).

In this petition, Holzer asserts that the motion for a directed verdict should have been granted because his alleged mail fraud was premised on the notion that citizens of Cook County and lawyers were deprived of "intangible rights." Petitioner here adopts the arguments on this issue carefully briefed and argued in the *McNally* and *Gray* appeals.

II.

THE INTANGIBLE RIGHTS THEORY SHOULD NOT EXTEND TO SUPPOSED FIDUCIARY DUTIES EXCLUDED FROM STATE COURT RULES

The *Holzer* case raises an additional and compelling issue: What body—a grand jury, a federal court, the United States Attorney, or the Illinois Supreme Court—has the duty to set the metes and bounds of the "intangible right" that the public official owes to the community. In short, how can a sitting judge have the specific intent to defraud the citizens if he complied with the published rules as they relate to recusal or disclosure of certain activities to litigants?

The Illinois Supreme Court rules controlling judicial conduct were admitted into evidence. (Ct. App. A229-239). The trial court advised the jury that those rules were "the standards of judicial conduct that were applicable to Judge Holzer." (Tr. 461). Two Illinois Supreme Court rules specifically cover disqualification or disclosure to litigants. The published rules do not require disclosure to litigants or disqualifications regarding loans.

Rule 66 is entitled: "Disqualification for and Disclosure of Financial Conflicts of Interest." Rule 66 allows a mandatory

disqualification ("shall disqualify") if the judge or any member of his immediate family has "any substantial financial interest in the result of any ruling" or if he or members of his immediate family have any "substantial financial interest in any corporation or business which is a party." The rule further provides that if the judge determines that the financial interest is "insubstantial," he must nonetheless make a full disclosure to the parties.

Rule 67 is entitled: "Disqualification for Other Financial Conflicts of Interest." Rule 67 relates to disqualification "in any case in which he [the judge] has previously acted as counsel."

The evidence at trial further included a report by the Dean of the University of Illinois Law School identified as the "Cribbet Report." Dean Cribbet headed a committee to make recommendations to the Illinois Supreme Court before the rules were adopted. The Cribbet Report recommended, as part of Rule 67, that disqualification also should occur in any situation in which the judge "incurred obligations which will involve associations with enterprises or persons likely to come before him in his official capacity." The trial testimony revealed that this part of the Cribbet Report referred to loans. The Illinois Supreme Court deliberately rejected that recommendation and it therefore was never made a part of the disqualification rules. (Tr. 2319-2322, 3443-3447).

The defendant testified that the Cribbet Report negated any requirement of an Illinois Supreme Court rule on disqualification involving loans:

> The fact that the Illinois Supreme Court rejected that portion of the Cribbet Report indicated, and indicates to me that I have a right to incur obligations or loans which may involve associations or banks or savings and loans, or even lawyers, who may come before me in my official capacity.

(Tr. 2666).

The Seventh Circuit, however, held that the failure to disclose was fraud.

> Holzer argues that he could not be deemed to have acted fraudulently when there was no clear-cut ethical rule prohibiting him from receiving loans from lawyers with business before him. This thrust is wide of the mark since even if the receipt of the loans was not prohibited, the failure to disclose their receipt, at the very least to counsel opposing the lenders, would be fraudulent in the circumstances.

(App. 9). The suggestion that the defendant is relying on the failure to have "a clear-cut ethical rule" is inaccurate. Defendant is relying on the Illinois Supreme Court rules that expressly mandate the duty to recuse and disclose. The Illinois Supreme Court was specifically asked—but declined—to define financial transactions to include loans. The rules of recusal and disclosure to litigants enacted by the Illinois Supreme Court to govern judicial conduct do not require the disclosure to litigants of the transactions on which the defendant was convicted. Thus, not only does this case involve so-called "intangible rights," but also those "intangible rights" resulted in a mail fraud conviction even though the Illinois Supreme Court excluded from its rules of judicial conduct the very "duty of disclosure" used to support the conviction.

The "intangible rights" duty, according to the Seventh Circuit, creates a "fraud" if "material" facts are not disclosed and the "standard" of materiality is an objective one. (App. 6).

> A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud.

Id. The *Holzer* case should be reversed because the trial court used a subjective standard that was based on what defendant "believed to be material." The district court took judicial notice of the following proposition:

> [A] public official, including a judge, has a duty not to conceal facts which he has reason to believe would be material to the public he serves, or to those members of the public whom he affects by the performance of his public duties.

(Tr. 1380). The difficulty with this restatement of a judge's duty, however, is that it is inconsistent with the Supreme Court rules. Rule 66 does not establish a discretionary rule. The judge "shall disqualify" in situations involving "financial interests" as defined in the rule. Indeed, the rule proceeds to state that only in those cases in which the financial interest is "insubstantial" or "immaterial" should the judge disclose the financial interest to the parties and litigants. (Ct. App. A236).

When the Supreme Court rules were introduced into evidence, the district court advised the jury that those rules were "standards of judicial conduct that are applicable to Judge Holzer." (Tr. 461). It is difficult, indeed, for a jury to determine what kinds of facts needed to be disclosed based on the judicial notice proposition that such disclosures depend on whether the judge "has reason to believe that the facts would be material." It is inconceivable that a federal crime can be based on such a "discretionary rule." The Seventh Circuit compounded this problem by holding that the standard was in fact "an objective one" and then ignoring the use by the district court of a discretionary subjective standard inconsistent with the Illinois Supreme Court rules.

III.

THE COURT FURTHER ERRED IN PERMITTING THE VERDICT TO STAND ON THE ALTERNATIVE THEORY OF "BRIBERY" WHEN NO BRIBERY INSTRUCTION ON MAIL FRAUD WAS SUBMITTED

In 1980, this Court held in reviewing a federal Securities Act conviction that a criminal conviction could not be affirmed on an alternative theory, the elements of which were not covered explicitly in the jury instructions:

> The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, *Rewis v. United States,* 401 U.S. 808, 814 (1971), see *Dunn v. United States,* 442 U.S. 100, 106 (1979), we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of § 10(b).

Chiarella v. United States, 445 U.S. 222, 236-37 (1980).

The Seventh Circuit in *Holzer* accepted the prosecution's argument that "bribery" had occurred and therefore the mail fraud conviction could be based on state court bribery. "Second, the systematic and long-continued receipt of bribes by a public official, coupled with active efforts to conceal the bribe-taking . . . is fraud . . . ." (App. 8). The Seventh Circuit thus erred by accepting such a theory and ignoring defendant's appeal that the jury was not instructed on the elements of bribery as part of mail fraud.

Any fair reading of the jury instructions regarding state bribery establishes that there was no instruction informing the jury as to how they should determine mail fraud based on state bribery. Under the RICO count, the elements of state bribery were defined in an instruction that plainly

states, "as used in Count 31, the term 'involving bribery' refers to a violation of the Illinois Bribery Statute". The instruction on Count 31 proceeds to define the relevant elements. (Tr. 3973). The jury instruction conferences and the remarks by the district court make it quite clear that bribery applied only to the RICO count. The Court should not affirm a conviction of mail fraud when the jury was not instructed as to how bribery serves as a predicate to mail fraud, particularly when the district court's bribery instruction confined the relevant elements to the RICO count.

IV.

IT IS PREJUDICIAL, REVERSIBLE ERROR TO SUPPORT THE GUILT OF A DEFENDANT OR ALLEGED CO-CONSPIRATOR BY PROOF THAT HE WAS INDICTED OR UNDER "INVESTIGATION"

This case was tainted throughout by the prosecution's persistent successful attempt to establish the guilt of the co-schemers by repeatedly providing that they had obviously done something "wrong" because the Illinois Attorneys' Disciplinary Commission was investigating them for the acts involved in this case. The Seventh Circuit held in an analogous situation that this was an improper means to prove that a witness had been "charged" with misconduct because such proof has an "inevitable tendency to inflame and prejudice the jury." *United States v. Dilts,* 501 F.2d 531, 535 (7th Cir. 1974). Other courts, in comparable situations, have reached similar results. *Jordan v. Medley,* 711 F.2d 211 (D.C. Cir. 1983); *United States v. Bentley,* 706 F.2d 1498 (8th Cir. 1983), *cert. den.,* 467 U.S. 1209 (1984); *United States v. Pennix,* 313 F.2d 524 (4th Cir. 1963).

The centerpiece of this case was whether the lawyers who dealt with the defendant were part of a conspiracy to defraud. Defendant denied that any such conspiracy existed

and testified at length in his defense. The prosecution called at least seven attorneys who had "transactions" with defendant, each of whom was an alleged "co-conspirator" in the scheme to defraud. The jury naturally believed that each of such witnesses had done something wrong and had engaged in some kind of misconduct because each witness was permitted to testify, over objection, that his actions had caused him to be "investigated" by the Illinois Attorneys' Disciplinary Commission. In this instance, the use of such testimony has another mischievous purpose, which is also improper. The prosecution obviously expected the jury to believe that a lawyer testifying under the cloud of state court disciplinary actions must be telling the truth, thereby fortifying the credibility of that witness. The Government cannot seriously suggest that in the usual criminal case they should be permitted to prove the "guilt" of a co-conspirator or defendant by establishing that unresolved "charges" (disciplinary, criminal, or otherwise) have been made against the witness.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari be issued so that the judgment below may be reviewed.

Dated: June 2, 1987

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD J. HOLZER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 CR 287—Prentice H. Marshall, *Judge.*

ARGUED DECEMBER 8, 1986—DECIDED APRIL 3, 1987

Before CUMMINGS and POSNER, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* A federal jury found Reginald Holzer, a former Cook County circuit judge (that is, a trial judge in Cook County's court of general jurisdiction), guilty of mail fraud, 18 U.S.C. § 1341, extortion, 18 U.S.C. § 1951 (the Hobbs Act), and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962. He was sentenced to a total of 18 years in prison, and appeals. He raises a variety of grounds, but most are either frivolous or foreclosed by previous decisions. The only issues warranting discussion are whether Holzer's conduct was fraudulent within the meaning of the mail-fraud statute and extortionate within the meaning of the Hobbs Act.

The previous prosecutions resulting from the "Greylord" investigation have involved the traffic and misdemeanor divisions of the Cook County Circuit Court, illustrative decisions being *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986), and *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). This is the first case to involve the law and chancery divisions. Between 1968 and 1978 Holzer was assigned to the law division, which handles mainly personal-injury suits. Between 1978 and his indictment in 1985, he was assigned to the chancery division, which hears equity suits. While in the law division and then the chancery division Holzer repeatedly asked lawyers who were representing parties in matters over which he was presiding, and (in the chancery division) equity receivers appointed by him, for help in getting bank loans to shore up his precarious finances. Construing the facts as favorably to the government as the record permits, which we must do in view of the jury's verdict, we shall now describe the transactions on which Holzer's conviction is based.

Gerald Morris, a personal-injury lawyer, was summoned to Holzer's chambers in 1972, shortly after a block of 22 cases in which Morris's firm represented the plaintiffs had been reassigned to Holzer. Holzer told Morris that he had financial problems and had to borrow five to ten thousand dollars right away. Although Holzer had known Morris for more than 20 years, he had never before asked Morris for a loan. Morris and his partner arranged for a relative to lend Holzer $3,500. They gave the relative the money needed for the loan so that he wouldn't be out of pocket himself. The following year, after another block reassignment of Morris's cases to Holzer, Holzer asked Morris to arrange another loan, even though Holzer had not paid any interest, or repaid any principal, on the first one. A $5,000 loan, similar to the previous one, was made. Neither loan has been repaid. At Holzer's request, Morris later arranged for $25,000 in bank loans to Holzer, which Morris's law firm guaranteed.

In 1977, Fred Lane, who was representing a party in a case pending before Holzer, signed a check for $2,500 made out to Holzer. At Holzer's request, Lane's secretary used the check to buy a cashier's check payable to a bank in which Holzer had an account. The check was entered in the law firm's loan account, but there were no formal loan papers and the "loan" has never been repaid.

Between 1978 and 1983, Holzer borrowed $25,000 from Ernest Worsek, whom Holzer appointed to many receiverships during this period. Worsek also arranged a $10,000 loan from his friend Zilka to Holzer, gave Holzer $500 in department store gift certificates, and bought a large life insurance policy from Holzer's wife, an insurance agent. The loans were all made at Holzer's request. Worsek (who had to borrow money in order to fund them) complied with the requests only because he feared losing the receiverships, which generated almost half his total income. In 1983 Worsek told Holzer that he would no longer make the payments on the Zilka loan, as he had been doing—whereupon Holzer stopped assigning receiverships to Worsek. Holzer repaid only $7,000 of the two loans.

In 1984 Worsek told Holzer that he had been interviewed by FBI agents. The two met at Holzer's request in another judge's jury room. At Holzer's suggestion they communicated in writing at this meeting, and when the meeting was over Holzer tore up the notes and flushed them down the toilet. After the meeting Holzer again began appointing Worsek to receiverships—nine altogether in the balance of 1984.

In 1979 Holzer summoned Russell Topper, who represented plaintiffs seeking $2 million in damages in a case pending before Holzer, to his chambers, told Topper he was in desperate need of money, and asked him for help in getting an unsecured $10,000 bank loan. When the bank that Topper contacted refused to make Holzer an unsecured loan, Topper purchased a $10,000 cashier's check payable to Holzer and gave the check to him. Although Holzer promised to repay the loan within a couple of

months, he did not sign a promissory note or give Topper a copy of his financial statement, and there was no discussion of interest on the loan. Several months later, on the eve of trial, Topper came to Holzer, told him that the $10,000 had been Topper's own money, and suggested that Holzer recuse himself. They agreed that before he did so they would try to settle the case. When, notwithstanding Holzer's efforts, settlement negotiations fell through, Holzer recused himself. The "loan" was never repaid.

Also in 1979 Holzer summoned to his chambers Nathan Powell, who represented the defendant in a suit pending before Holzer, and told him he needed a $10,000 loan. Powell said that without security Holzer would not be able to get a loan. Holzer pressed him to do what he could. Although Powell had known Holzer for many years, this was the first time that Holzer had asked him for help with a loan. After getting his client to put up collateral for a $10,000 bank loan to Holzer, Powell told Holzer to call an officer of the bank named Maram. Powell told Holzer that someone had put up collateral for the loan but didn't tell him who. Several months earlier Maram had rejected Holzer's application for a $10,000 unsecured loan, but this time, with the loan secured, the application was approved.

In 1980 two lawyers with cases before Holzer, Neistein and Richman, made payments at Holzer's request on a bank loan which they had arranged for him and on which he was delinquent. The following year Becker, a lawyer with a case before Holzer, and Green, Becker's client, arranged at Holzer's request for a bank loan of $24,000 to Holzer, covertly funded by a bank that Green owned. Although Holzer was not told about Green's help in getting the money for the loan, some of the payment notices that the lending bank sent to Holzer showed Green's name typed in the place for the borrower and then crossed out (but still readable). Also that year, Holzer asked Karzov, whom he had appointed to be the attorney for one of Worsek's receiverships, for a $1,000 cash loan. Karzov gave him the money. Half the loan was repaid after the FBI

began its investigation of Holzer; the other half has never been repaid.

In 1982 Stanley Lieberman sought receivership appointments from Holzer, and in 1983 received an appointment. After the two had lunch together one day, they repaired to Holzer's chambers where Holzer told Lieberman that he was in extreme financial difficulty and needed a loan of $25,000 to $30,000 (apparently to repay the bank loan he had gotten through Becker and Green). After Holzer "struck out" at two downtown banks (one of which wrote him that it was rejecting his loan application because of his high ratio of debt to equity), Lieberman at Holzer's request approached a suburban bank with which Lieberman did business and asked it to make a loan to Holzer. Lieberman agreed to guarantee the loan and told the bank not to tell Holzer about the guarantee. The loan was made and later Holzer appointed Lieberman to another receivership.

On twelve occasions between 1979 and 1983, Holzer appointed Burton Schatz as an attorney for a receiver (usually Worsek) or as a guardian *ad litem*, and during this period Schatz wrote checks to Holzer totaling $18,300. This was about $10,000 less than the fees Holzer had awarded him for his services in these appointments.

Rule 68 of the rules of the Illinois Supreme Court requires each circuit judge to file an annual ethics statement. In a confidential portion of the statement the judge is required to list "creditors to whom amounts in excess of $1,000 are owed by me," and also any potential conflicts of interest. Until 1985, which was after Holzer became aware of the FBI's investigation of his affairs, his statement listed as creditors none of the persons we have mentioned from whom or through whom he had obtained loans. The supplemental statements that he filed in 1985 were incomplete. And in response to questionnaires submitted to judicial candidates by a citizens' group, Holzer when he was running for election as circuit judge in 1974 and for reelection in 1982 had stated that he accepted "no gifts at all" and "absolutely no contributions, gifts, or favors of any kind at any time."

The question is whether the facts we have recited establish fraud within the meaning of the mail-fraud statute and extortion within the meaning of the Hobbs Act. In arguing that they do not, Holzer asks us to accept his characterization of the facts: He was hard up for money and asked assistance of anyone he thought might be able to introduce him to a bank, and naturally the persons solicited included lawyers and naturally some of them had matters before him; he had no idea that the lawyers were guaranteeing the loans they helped him to obtain from banks, and he never threatened the lawyers with adverse rulings if they failed to help him and never promised them favorable rulings if they did help him; nor were any of his rulings influenced by the loans; nor, finally, did it occur to him that he had a duty to disclose these dealings to counsel, the state, or the public. Although this is a possible (but highly implausible) characterization of the facts, it is not one that the jury was required to accept. An alternative characterization, one that is both more plausible and fully supported by the evidence at the trial, is that Holzer over a period of many years used his public office to obtain money through deceit and extortion.

Fraud in its elementary common law sense of deceit—and this is one of the meanings that fraud bears in the statute, see *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1985)—includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud. When a judge is busily soliciting loans from counsel to one party, and not telling the opposing counsel (let alone the public), he is concealing material information in violation of his fiduciary obligations.

The standard of materiality is an objective one; it does not reach every piece of information that a particular litigant might like to have about a judge. A judge need not disclose information that would not make a reasonable person think him incapable of presiding impartially in the

case. Thus he need not, in a case to which Sears Roebuck is a party, disclose that he is a customer of Sears; he need not, in a case involving the First National Bank, disclose that he has an account at the bank. *United States v. Gregory*, 508 F. Supp. 1218, 1220 (S.D. Ala. 1980), app. dismissed and mandamus denied, 656 F.2d 1132 (5th Cir. 1981). The facts of this case as the jury could reasonably have found them are dramatically different. Here is a man in desperate financial straits, unable to borrow through ordinary channels, who turns for help to people over whom he has power: lawyers in cases over which he is presiding and persons to whom he has the power to award lucrative receiverships and guardianships. When he asks them for help, either they lend their own money directly to him or, as if by magic, bank loans that he had tried and failed to get suddenly materialize. It is doubtful that these transactions should be called "loans." Out of some $200,000 in documented receipts from these sources, Holzer repaid almost nothing; and the evidence supports an inference that he never intended to repay the money in full, realizing that the lawyers and guarantors of the loans would never press him for repayment, because they would fear retribution—with reason, if one may judge from Worsek's fate after he stopped making payments on the Zilka loan. Most of the loans, indeed, seem to have been thinly disguised bribes. Several listed on a private record that Holzer kept of his personal debts were crossed out—without having been repaid.

The character of the "loans" has a twofold significance. First, it shows that these were not arms-length transactions (though the Illinois Supreme Court's Rule 68 requires disclosure even of arms-length loans). Neither party to an arms-length transaction is expected to show gratitude, or to feel a sense of residual obligation, to the other. A judge is not "grateful" to Sears Roebuck for selling him a lawnmower at the market price of lawnmowers. It is when the other party to the transaction is doing him a favor that an inference of gratitude, or an inference that a quid pro quo can be expected, may arise and make the

failure to disclose the transaction to counsel for the opposing litigant material.

Second, the systematic and long-continued receipt of bribes by a public official, coupled with active efforts to conceal the bribe-taking from the public and the authorities (as in Holzer's Rule 68 filings and his response to voter questionnaires), is fraud (again in its elementary sense of deceit, and quite possibly in other senses as well), even if it is the public rather than counsel that is being kept in the dark. It is irrelevant that, so far as appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan, so that his conduct caused no demonstrable loss either to a litigant or to the public at large. See, e.g., *United States v. Keane*, 522 F.2d 534, 541, 546 (7th Cir. 1975); *United States v. Lovett*, No. 85-2967, slip op. at 12 (7th Cir. Jan. 26, 1987); *United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1939). How can anyone prove how a judge would have ruled if he had not been bribed? And if it were necessary to show that the judge had ruled differently than he would have done if he had not been bribed, it would mean that a judge would not be committing fraud when he demanded and received equal bribes from both sides of a lawsuit. A system in which judges are paid by the parties rather than by the state does not inherently distort judgment; it is, indeed, the system used in arbitration, which is a type of adjudication, and it was also used in the judicial system of England until well into the nineteenth century. But the State of Illinois has decided that judges shall not be compensated out of fees paid by the litigants, and a judge who disregards this decision deprives the state of whatever benefits (what the cases call the public's "intangible rights") it hoped to obtain from the system of compensation that it did adopt. He also makes litigants pay double for judicial services—once in their taxes (which pay the judges' salaries), and the second time in fees paid directly to the judge. When, in addition, the judge conceals what he is doing, he commits fraud; for what he is concealing is clearly material information to his employer, the state.

United States v. Rabbitt, 583 F.2d 1014, 1024-26 (8th Cir. 1978), does not require a different conclusion. A state legislator received a secret commission from an architectural firm to help it get state contracts. Not only was there no evidence that his efforts on the firm's behalf caused any actual loss to the state, but the court was also not convinced that his conduct had deprived the state of its right to honesty and fairness in the performance of the defendant's official duties, because the contracts were awarded on a merit basis by officials over whom the defendant had no power. We very much doubt the soundness of this reasoning. The fact that the defendant did not control the award of contracts should not be decisive if his position as a state legislator gives his recommendations a weight independent of their intrinsic merit. But the case in any event is different from this one. Holzer received money from persons appearing before him in his official capacity rather than from persons having business before other judges or before the executive or legislative branches of state government. The Eighth Circuit upheld Rabbitt's conviction of mail fraud for peddling his influence to obtain legislation favorable to a trade association that had bribed him.

Holzer argues that he could not be deemed to have acted fraudulently when there was no clear-cut ethical rule prohibiting him from receiving loans from lawyers with business before him. This thrust is wide of the mark, since even if the receipt of the loans were not prohibited, the failure to disclose their receipt, at the very least to counsel opposing the lenders, would be fraudulent in the circumstances. But this point to one side, we do not agree that the absence of an explicit rule should make a difference. We do agree that the words "scheme or artifice to defraud" don't reach everything that might strike a court as unethical conduct or sharp dealing, despite broad language to this effect in cases that we criticized in *United States v. Dial*, *supra*, 757 F.2d at 170, including our own *United States v. Serlin*, 538 F.2d 737, 744 (7th Cir. 1976). The frequently quoted suggestion in *Gregory v. United*

States, 253 F.2d 104, 109 (5th Cir. 1958), that whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society" is fraud (see, e.g., *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)) cannot have been intended, and must not be taken, literally. It is much too broad and, given the ease of satisfying the mailing requirement, illustrated by *United States v. Green*, 786 F.2d 247, 249-57 (7th Cir. 1986), would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute. However, as we emphasized in *Dial*, elaborate efforts at concealment—illustrated here by Holzer's clandestine meeting with Worsek after the FBI investigation began, by his failure to list the "loans" on his Rule 68 statement, and by his repeated public denials of receiving favors of any kind (which certainly included such questionable loans from counsel appearing before him)—are powerful evidence that a defendant's conduct violates an ethical standard well known to him and to the whole community, and not just something thought up after the fact by a perhaps overly sensitive federal judge. See 757 F.2d at 270; *United States v. Brown*, 540 F.2d 364, 375 (8th Cir. 1976).

We need not consider whether the receipt of bribes might be fraud under the mail-fraud statute if done openly. The legal meaning of "fraud" is not limited to deceit or misrepresentation; it includes overreaching, undue influence, and other forms of misconduct. There have been cases, like *United States v. Gorny*, 732 F.2d 597, 601-02 (7th Cir. 1984), where convictions of mail fraud based on bribe-taking were upheld without consideration of concealment. The issue is academic, since no public official in the United States takes bribes openly, but is in any event not one we need consider here, since the instructions made intent to deceive an element of the fraud with which Holzer was charged.

A law review note argues from the legislative history of the mail-fraud statute that Congress never intended

the statute to reach a case such as this where the public official does not obtain anything of value from the victims of the fraud—from litigants whose lawyers did not make loans to Holzer, or from the citizens of Illinois whose confidence in their government may have been undermined. Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562 (1980). The argument is repeated in a case pending in the Supreme Court. See Brief for Petitioner Gray in *McNally v. United States*, Nos. 86-234, 86-286, October Term 1986. The argument depends on the view that the meaning of fraud in the mail-fraud statute was frozen by the conception of fraud held by the framers of the statute when it was first passed back in the nineteenth century. This seems to us the opposite and equally untenable extreme from arguing that fraud is whatever strikes a judge as bad, but in any event the "intangible rights" concept that the argument attacks is too well established in the courts of appeals for us to disturb.

We turn to the issue of extortion, defined in the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951(b)(2). Holzer questions the sufficiency of the evidence to support an inference that the lawyers who made loans to him were acting out of fear.

Except in cases involving a threat, or actuality, of force or violence, the payment must be induced either by fear of what the payee might do if payment were not forthcoming, or by the defendant's office ("color of official right"). The two types of inducement (fear and office) should be distinguished. The first is based on fear of retribution by the official, wielding his official powers; the second is based on a hope of benefit from the exercise of those powers. The first covers cases of actual or implied threat to use (or not use) official powers to harm a person if he doesn't pay the official, and corresponds to the lay sense of "extortion"; the latter covers cases where bribes are

offered and accepted even without having been solicited. See *United States v. Braasch*, 505 F.2d 139, 150-51 and n. 7 (7th Cir. 1974). Both types of "extortion" were charged in this case, and proved. When a judge urgently and insistently asks a lawyer in a case before him for a loan, the request connotes an implied threat (or so a jury could reasonably conclude) to rule against the lawyer if he turns the judge down. It is irrelevant that the judge would not, and knows he would not, retaliate against the lawyer if the lawyer spurned his request, just as it is irrelevant in a robbery case that the robber would not in fact have pulled the trigger if his victim had refused to hand over the money. A threat is not a state of mind in the threatener; it is an appearance to the victim. A statement that a person is intended to and does understand to be a threat is a threat even if the person making it is bluffing. It is therefore enough that a reasonable jury could have found that Judge Holzer's requests for loans were intended to and did induce the persons to whom they were addressed to think that if they didn't comply they might be visited with subtle or not-so-subtle judicial retaliation. See *United States v. Crowley*, 504 F.2d 992, 995 n. 5 (7th Cir. 1974). It was not subtle in Worsek's case.

Some of the lawyers whom Holzer solicited had been acquaintances of his for many years, yet not until they had cases pending before him did he solicit their financial assistance. Worsek and Lieberman were serving as receivers, at his pleasure, when he solicited them. He made clear to many of the lawyers and receivers that he was in desperate straits. He could leave them to draw the natural inference that if they didn't play ball he might retaliate, as in fact he did retaliate against Worsek. They testified that that was precisely the inference they did draw. Holzer testified that he did not mean to convey any such impression, but the jury was not required to believe him. He is an intelligent man fully capable of understanding that the lawyers and receivers he was dealing with were digging into their own pockets to help him, out of fear of the financial and professional consequences if they

did not; and the jury was entitled to conclude that he deliberately took advantage of their fears to line his pockets. He was not the passive recipient of favors; he actively solicited them, using his office as the weapon, though except in the case of Worsek the weapon apparently remained sheathed.

It would not help Holzer even if he were the passive recipient of loans, pressed on him by lawyers eager to curry favor with him. Extortion "under color of official right" equals the knowing receipt of bribes; they need not be solicited. That at least is the view in this circuit. See *United States v. Murphy, supra*, 768 F.2d at 1530; *United States v. Blackwood*, 768 F.2d 131, 134 (7th 1985); *United States v. Schmidt*, 760 F.2d 828, 832 (7th Cir. 1985); *United States v. Price*, 617 F.2d 455, 458 (7th Cir. 1979). The Second Circuit has taken a different view, see *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc), but one we have declined to follow. In this circuit it is extortion if the official knows that the bribe, gift, or other favor is motivated by a hope that it will influence him in the exercise of his office and if, knowing this, he accepts the bribe. There is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been pressed was the official passive (here he was hyperactive in the solicitation of bribes thinly disguised as loans). The issue was how the jury should be instructed. That issue is not presented here, since Holzer does not complain about the instructions.

The facts reveal and the jury found an appalling betrayal of the public trust. The evidence was ample, the instructions correct, the conduct of the trial fair, the sentence reasonable, and the judgment is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—4-3-87—450

APPENDIX B

United States District Court
THE NORTHERN DISTRICT OF [illegible]
EASTERN DIVISION

United States of America vs.

DEFENDANT: REGINALD J. HOLZER

DOCKET NO.: 85 CR 287-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date: 5 21 1986

___ WITHOUT COUNSEL However, the court informed defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

X WITH COUNSEL Edward L. Foote
(Name of counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea. ___ NOLO CONTENDERE X NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ___ NOT GUILTY. Defendant is discharged
X GUILTY

Defendant has been convicted as charged of the offense(s) knowingly caused to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, envelopes containing, among other things, defendant's Rule 68 sealed statement, and that he committed and attempted to commit extortion, he solicited and received property and personal advantage which he was not authorized by law to accept. All in violation of Title 18, United States Code, Sections 1341, 1951 and 1962(c).

SENTENCE OR PROBATION ORDER

The Court adjudged defendant guilty as charged and convicted and ordered that: the defendant is hereby committed on the above plea to the custody of the Attorney General for a period of FIVE (5) YEARS on counts 1 thru 10, 14 thru 23, 27, 29 & 30 to run concurrent with each other.

On Counts 12, 13 & 25 defendant is sentenced to the custody of the Attorney General for a period of EIGHTEEN (18) YEARS, said sentences to run concurrent with each and concurrent with the sentences imposed on counts 1 thru 10, 14 thru 23, 27, 29 & 30.

On Count 31 defendant is sentenced to the custody of the Attorney General for a period of EIGHTEEN (18) YEARS, to run concurrent with the sentences imposed on counts 1 thru 10, 14 thru 23, 27, 29 & 30 and counts 12, 13 & 25.

SPECIAL CONDITIONS OF PROBATION

Sentence to be served pursuant to 18 U.S.C. Sect. 4205(b)(2).

Further Ordered that execution of sentence is stayed until noon July 31, 1986. Defendant is granted permission to surrender to the Federal Correctional Institution designated by the Bureau of Prisons.

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

Federal Correctional Institution, Oxford, Wisconsin

SIGNED BY

X U.S. District Judge

___ U.S. Magistrate

/s/ PRENTICE H. MARSHALL

Date May 21, 1986

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APPENDIX C

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

Mr. H. Stuart Cunningham, Clerk
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Date: April 27, 1987

Re: UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

REGINALD J. HOLZER, Defendant-Appellant,

U.S.C.A.-7 No. 86-1879 District Court No. 85 CR 287
Judge Prentice H. Marshall

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal. Please acknowledge receipt on the enclosed copy of this letter.

RECEIVED

Contents of Record being Returned:

3 Vols. Pleadings
4 Vols. Transcripts

Contents of Record to be Returned Later:

23 Vols. Transcripts

H. S... Cunningham, Clerk
United States District Court

Rebel L. Foote
U.S.C.A. Deputy Clerk

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

Date: _____

_____
Clerk of District Court

Copies Mailed to:

Edward L. Foote, Winston & Strawn, One 1st National Plaza, Chicago, IL
Office of United States Attorney, 219 South Dearborn, Chicago, IL
Office of United States Marshal, 219 South Dearborn, Chicago, IL
Office of United States Probation Officer, 219 South Dearborn, Chicago, IL

U.S.C.A. - 7th Circuit
FILED

ENTERED
MAY - 4 1987
ON DOCKET

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, counsel is to withdraw the same within 14 days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

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APPENDIX D

PERTINENT STATUTES INVOLVED

CHAPTER 63 — MAIL FRAUD

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out, to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

CHAPTER 95 — RACKETEERING

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not

more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

CHAPTER 96 — RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 U.S.C. § 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is

indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs,

punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and

charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securi-

ties on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section.

Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and therafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destoryed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or

unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an

enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to —

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of

this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to —

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(*l*) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the

property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, and additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the cirminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Supreme Court, U.S.
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No. 86-1906

In the Supreme Court of the United States

OCTOBER TERM, 1987

REGINALD J. HOLZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner, a former state court judge who repeatedly extorted money from lawyers appearing before him, contends that the court of appeals erred in affirming his mail fraud conviction, which was based on the theory that petitioner deprived the citizens of his state of their intangible right to his honest services.

1. After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 23 counts charging mail fraud, in violation of 18 U.S.C. 1341, three counts charging extortion, in violation of 18 U.S.C. 1951 (the Hobbs Act), and one count charging a violation of 18 U.S.C. 1962, part of the Racketeer Influenced and Corrupt Organization Act (RICO). He was sentenced to concurrent terms of 18 years' imprisonment on the RICO and Hobbs Act counts and five years' imprisonment on the mail fraud counts. The court of appeals affirmed (Pet. App. A1-A14).

Petitioner's prosecution developed out of the "Greylord" investigation. The evidence at trial, summarized in the opinion of the court of appeals (Pet. App. A2-A5), showed that while he was a trial judge in the Cook County court of general jurisdiction, petitioner

asked a number of attorneys appearing before him for help in obtaining loans. Some of the attorneys made loans to petitioner out of their own pockets; other guaranteed loans by banks. The court of appeals characterized these transactions as "thinly disguised bribes" (*id.* at A7). Petitioner did not list the attorneys from whom he borrowed money as creditors on the annual ethics statements that he was required to file, nor did he identify any potential conflicts of interest arising out of the transactions (*id.* at A5).[1]

In affirming petitioner's mail fraud conviction, the court of appeals noted that petitioner's "conduct caused no demonstrable [financial] loss either to a litigant or to the public at large" (Pet. App. A8). However, the court concluded, petitioner's "appalling betrayal of the public trust" (*id.* at A13) deprived the citizens of their intangible right to his honest services (*id.* at A8). In response to petitioner's challenge to the intangible rights mail fraud theory, the court added that it "is too well established in the courts of appeals for us to disturb" (*id.* at A11). The court also affirmed petitioner's convictions on the RICO and Hobbs Act counts.

2. After the petition was filed, this Court held in *McNally* v. *United States*, No. 86-234 (June 24, 1987), slip op. 10, that the mail fraud statute does not prohibit deprivations of intangible rights, but is instead "limited in scope to the protection of property rights." The Court specifically noted, in concluding that the mail fraud convictions in *McNally* could not stand, that "the jury was

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[1] Although petitioner states (Pet. 3-4) that the Illinois Supreme Court rules governing judicial conduct do not require disclosure to litigants of loans or the acceptance of assistance in obtaining loans, petitioner fails to note that Illinois Supreme Court Rule 68 requires judges to file annual reports listing creditors to whom they owe more than $1,000 and also listing all potential conflicts of interest. See Pet. App. A5. It is undisputed that petitioner omitted from his annual Rule 68 statements the loans he obtained and any mention of the resulting potential conflicts of interest.

not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). Accordingly, the court of appeals' decision affirming the mail fraud counts appears to be contrary to this Court's decision in *McNally*.[2]

There is no warrant for plenary review by this Court, since there is no merit to petitioner's contentions other than his attack on the intangible rights mail fraud theory. Petitioner's suggestion (Pet. 10-11) that the court of appeals affirmed on a bribery theory rather than on the intangible rights mail fraud theory presented to the jury is frivolous. The court did not conclude that the receipt of bribes establishes mail fraud, but instead held that petitioner's concealment of the loans he extorted from the public was fraudulent (Pet. App. A8).

Petitioner also argues (Pet. 11-12) that the trial court erred in permitting the attorneys who made loans to him to testify that they had been investigated by the Illinois Attorney Registration and Disciplinary Commission and that they were testifying under grants of federal immunity. The court of appeals properly described this argument as frivolous (Pet. App. A8). It is settled that the admission of such evidence is within the discretion of the district court, whose decision is accordingly subject to review only for abuse. See, *e.g.*, *United States* v. *Carter*, 720 F.2d 941, 947-948 (7th Cir. 1983). Here the trial court did not abuse its discretion in permitting this evidence to be elicited during the witnesses' direct examination, particularly in light of petitioner's intent to cross-examine some of them on the matter. Allowing examination of some but not other witnesses concerning immunity would have led the jury to conclude improperly that the government was not concerned about the actions of those witnesses not questioned

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[2] The petition does not challenge petitioner's convictions on the Hobbs Act or RICO counts.

about immunity. Moreover, it does not appear that petitioner was damaged by the trial court's actions. The court instructed the jury that the immunized witnesses' testimony should be examined with great care. Far from bolstering their testimony, the evidence coupled with the instruction informed the jury that the credibility of those witnesses was open to dispute. Petitioner cites no conflicting cases suggesting that what the trial court did was improper.

It is respectfully submitted that the Court should grant the petition, vacate the judgment below, and remand the case to the court of appeals for reconsideration in light of *McNally* v. *United States*, No. 86-234.

CHARLES FRIED
Solicitor General

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